Supreme Court, U.S.
FILED

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No.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

SYLVESTER ABRAMS,

Petitioner,

vs.

PAUL BARNETT, Warden,
Danville Correctional Center,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. (A) Does the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104-132, 110 Stat. 1214, apply to habeas cases pending in the federal system before the effective date of the Act?

(B) Certiorari having been allowed by this Court, No. 96-6298, in Lindh v. Murphy, No. 95-3608 (7 Cir. Sept. 12, 1996) - the decision upon which the 7th Circuit relied in applying the Act to the present case - should certiorari be allowed so this Court may consider this case together with Lindh?

Alternatively,

(C) Should action on the present petition be held in abeyance pending this Court's ruling in Lindh?

2. Was defendant's 6th Amendment right to effective assistance of counsel, as guaranteed by 14th Amendment due process of law, violated when the State trial court prohibited private communication between defendant and his lawyer during a 2-hour noon recess, when counsel needed private communication with defendant to prepare defendant for his testimony?

PARTIES INVOLVED

Petitioner, Sylvester Abrams, was the petitioner in the United States District Court for the Northern District of Illinois, Eastern Division, and appellant in the United States Court of Appeals for the Seventh Circuit.

Respondent, Paul Barnett, Warden, Danville Correctional Center, was the respondent in the District Court, and appellee in the Court of Appeals.

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1. (A) The Court should grant certiorari to determine whether the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104-132, 110 Stat. 1214, applies to habeas cases pending in the federal system before the effective date of the Act.

(B) Certiorari having been allowed by this Court, No. 96-6298, in Lindh v. Murphy, No. 95-3608 (7 Cir. Sept. 12, 1996) - the decision upon which the 7th Circuit relied in applying the Act to the present case - certiorari should be allowed here so this Court may consider this case together with Lindh?

Alternatively,

(C) Action on the present petition should be held in abeyance pending this Court's ruling in Lindh. 11

2. Defendant's 6th Amendment right to effective assistance of counsel, as guaranteed by 14th Amendment due process of law, was violated when the State trial court prohibited private communication between defendant and his lawyer during a 2-hour noon recess, shortly before the State rested and before defendant's testimony commenced, when counsel needed private communication with defendant to review defendant's testimony with him and to prepare defendant for his testimony. 13

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Judgment Below

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Sylvester Abrams, (hereafter, petitioner, or defendant), prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, denying his petition for writ of habeas corpus - by which habeas action he sought relief from his conviction for murder and sentence of 30 years.

Judgment, Opinion and Orders Below

The Opinion of the Court of Appeals for the Seventh Circuit, affirming the District Court's judgment, reported at 100 F.3d 485, is set out as App. A. The

Jurisdictional Statement

On November 8, 1996, the Court of Appeals filed its Opinion (App. A) affirming the judgment of the District Court. No petition for rehearing was filed.

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rules 10.1, 12.1 and 13.1 of this Court.

Basis for Federal Jurisdiction

Jurisdiction in the District Court is based on 28 U.S.C. § 2254(a).

Constitutional Provisions

The 6th Amendment to the U.S. Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The 14th Amendment to the U.S. Constitution, sec. 1, provides in pertinent part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Petitioner, Sylvester Abrams, an Illinois State prisoner (hereafter, defendant), appealed from the District Court's judgment denying his petition for a writ of habeas corpus, in which defendant raised, *inter alia*, the claim that he was denied effective assistance of trial counsel when the State trial court improperly restricted private consultation between defendant (who was in custody) and his lawyer during a 2-hour noon-time recess shortly before the State had rested and just before defendant testified. The District Court, while denying the petition in a Memorandum Opinion attached as App. B to this Petition, issued a Certificate of Probable Cause. (R. 17, 18) The Court

of Appeals affirmed. (App. A)

STATEMENT OF FACTS

Defendant was found guilty by a jury of murder and sentenced to 30 years; judgment was affirmed by the Illinois Appellate Court. People v. Abrams, 260 Ill.App.3d 566, 631 N.E.2d 1312, 197 Ill.Dec. 853 (1 Dist. 1994).

While the evidentiary facts at trial are not essential to the right to counsel claim raised on habeas, on appeal and in this Petition, it is appropriate to mention that in issuing the Certificate of Probable Cause, the District Court expressed grave doubt as to the reliability of the identification evidence. (R. 17, p. 2) The Court stated that the jury's decision to credit the eyewitnesses "was a dubious

one," since the "jury apparently ignored or severely discounted on-the-scene evidence that the assailant was much shorter and much less heavy than Abrams." (R. 17, p. 2) It is defendant's position that the jury could well have made a different credibility determination, and thus reached a different result - defendant's acquittal - had his testimony been better prepared so as to present a more credible demeanor and generally present a better impression of himself to the jury.

The undisputed evidence as to the physical layout of the facilities available to defendant, who was in custody, and counsel for consultation during the 2-hour noon recess just prior to defendant testifying, is as follows:

Due to "unusual security concerns," normal attorney-client communications were impossible in the custody area; the only possible communication was "through the speaking hole in the holding cell." (App. 11 to defendant's 7th Cir. Brief) "[C]ounsel was permitted to consult through a 1" by 4" hole leading into the bullpen area where prisoners are detained." (Ibid.)

As detailed further in the Argument below, what occurred, in brief, was as follows:

Shortly before the state rested, defense counsel, over a two hour noon recess, desired and needed to speak to his client in private, to discuss defendant's intended testimony. The trial court would not permit defendant,

who was in custody, to meet privately with his counsel. (Tr. 168-69)

In denying defendant's motion for new trial, the State trial court conceded that defendant was prevented from meeting privately with his lawyer:

> "There was one time where because of the involvement with the security issues counsel could not speak in private." (Supp. R. 21-22)

This occurred at a vital point in the trial, shortly before the State had rested, and defense counsel needed to confer in private with defendant to go over and analyze the prosecution's evidence and to prepare defendant's testimony.

Counsel advised the court, prior to the recess, that he was advised by the Sheriff's Department that the practice

that had routinely existed - permitting counsel to meet with an in-custody client privately during a recess, either in a separate room, or in a private area in the "bullpen" separated from other inmates - had been changed. (Tr. 167-68) The Sheriff advised counsel, and the court so acquiesced in the orders of the Sheriff, that the only means for counsel to communicate with the defendant was through a little slot, measuring 1" by 4", in a window. To communicate through this slot, one must shout. There is no dispute that a number of other inmates were in the bullpen at the time when, to confer, defendant and his lawyer would have had to shout through this one by four inch hole in the window. (Supp. R, 11)

This precluded private communication between counsel and defendant concerning defendant's testimony.

In its Opinion affirming the District Court's denial of habeas relief, the 7th Circuit applied the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104-132, 110 Stat. 1214, via authority of its own prior decision in Lindh v. Murphy, No. 95-3608, decided September 12, 1996. (App. A, p. 6) This Court has granted certiorari in Lindh v. Murphy, Sup. Ct. No. 96-6298.

REASONS FOR GRANTING CERTIORARI

1. (A) The Court should grant certiorari to determine whether the Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104-132, 110 Stat. 1214, applies to habeas cases pending in the federal system before the effective date of the Act.

(B) Certiorari having been allowed by this Court, No. 96-6298, in Lindh v. Murphy, No. 95-3608 (7 Cir. Sept. 12, 1996) - the decision upon which the 7th Circuit relied in applying the Act to the present case - certiorari should be allowed here so this Court may consider this case together with Lindh.

Alternatively,

(C) Action on the present petition should be held in abeyance pending this Court's ruling in Lindh.

Certiorari should be granted because the 7th Circuit's Opinion in this case was rendered under the misapprehension that the new Habeas Act - that is, the Antiterrorism and

Effective Death Penalty Act of 1996, Public Law 104-132, 110 Stat. 1214 - applies to habeas cases pending in the federal system before the effective date of the Act.

The Court of Appeals held that the new Habeas Corpus Act was applicable. (App. A, p. 6) The Court of Appeals relied on its prior decision in Lindh v. Murphy, No. 95-3608 (7 Cir. September, 1996). This Court has granted certiorari in Lindh v. Murphy, U.S. Supreme Court No. 96-6298.

The instant case should be taken on certiorari for consideration with Lindh, or alternatively, the Petition for Writ of Certiorari in this case should be held in abeyance until the Court rules on the issue in Lindh.

2. Defendant's 6th Amendment right to effective assistance of counsel, as guaranteed by 14th Amendment due process of law, was violated when the State trial court prohibited private communication between defendant and his lawyer during a 2-hour noon recess, shortly before the State rested and before defendant's testimony commenced, when counsel needed private communication with defendant to review defendant's testimony with him and to prepare defendant for his testimony.

In Geders v. United States, 425 U.S. 80, 47 L.Ed.2d 592 (1976), this Court held that a court order preventing the defendant from consulting with his attorney denied him effective assistance of counsel. In Perry v. Leeke, 488 U.S. 272, 102 L.Ed.2d 624 (1988), this Court held there was no improper prohibition when, during the defendant's testimony, there was a fifteen minute recess and the court barred conversation between defendant and counsel during that

recess.

At issue here, is whether a prohibition that defendant confer with counsel in private during a two hour recess, at which time counsel desires and needs to prepare defendant's testimony, violates the constitutionally mandated rule of Geders.

And surely it must be held that it does.

Certiorari should be allowed, since no controlling authority presents a comparable factual situation with respect to the improper restriction on private communication between counsel and client PRIOR to the client taking the stand in his own defense.

In the instant case, shortly before the State rested, defense counsel, over

a two hour noon recess, desired to speak to his client in private, to discuss defendant's intended testimony, including - but not limited to - response to testimony of three witnesses who had testified against defendant in the morning session.[1] (See R. 9, p. 7; counsel desired to go over defendant's entire proposed testimony.)

The trial court would not permit

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[1] The three witnesses included Consuelo Morgan, a Chicago Police Officer (Tr. 112), John McKenna (Tr. 133) and Detective Mike Miller. (Tr. 148) This last witness presented most damaging testimony, i.e., that defendant acted as a guilty person would, i.e., he fled from the police back into an apartment. (Tr. 151-52) McKenna also was the officer who conducted the show-up at which defendant was identified. (Tr. 156-57)

defendant and counsel to meet privately.[2]

In denying the motion for new trial, the State trial court conceded that defendant was prevented from meeting with his attorney privately:

> "There was one time where because of the involvement with the security issues counsel could not speak in private." (Supp. R. 21-22)

This occurred at a vital point in the trial, shortly before the State had rested, and defense counsel wished to and needed to confer in private with his client to go over and analyze the prosecution's evidence and decide how the defendant would honestly respond to

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[2] For decisions holding what restrictions on private communication violate the right to counsel, see footnote 5, pp. 22-25, infra.

that evidence, and to prepare defendant's testimony.[3]

The 7th Circuit here has held that there was no violation of the right to counsel as per Geders, because here, defendant and counsel were not prohibited from speaking, but only that they were prohibited from speaking in private. This is a distinction without a difference; and surely this Court should take this case as a most appropriate vehicle by which to declare

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[3] In discussing why it is essential for defendant and counsel to have opportunity for consultation in preparation for defendant's upcoming testimony, the Court of Appeals in Mudd v. United States, 798 F.2d 1509, 1512 (D.C. Cir. 1986), reversing conviction because consultation prohibited, said:

> "More generally, defendant may have needed advice on demeanor or speaking style . . . ."

that a defendant's right to counsel is violated where defendant and counsel are allowed to talk but only in a situation where their conversations can be overheard.

Here, there is no doubt that the means of communication allowed were prohibited by the court from being private.

This means of communication which defendant and counsel were forced to use, is not private. It was not sufficient for meaningful attorney-client communication. There were other inmates in the room with the defendant, so that anything said by defendant and counsel through the slot in the window would be heard by others. (Supp. R. 11; see fn. 4, p. 21, infra.) Hence, during

the noon recess, which was some two hours in length, counsel was totally precluded from private, meaningful communication with his client. Lawyer and client could not communicate with one another concerning the client's testimony.

Both the trial court and the State recognized that there could not be private communications. The State trial court stated:

> "The Court: I understand your concern. I am glad you are making a record of it. The issue, of course, is a question of security and the sheriff's are especially, this week, very concerned about security as there was a significant security breach in this building last week. I know the Chief Judge's order is quite strict. I'm sure it is something that can be developed as we take a little closer look at security in these smaller courtrooms, but this time that is the court's order, the

> Chief Judge's order. I have given you an opportunity to at least speak here. With that I think we're ready to bring out the jury.
>
> Mr. Cohn: 'Here' means in open court with the State's Attorney and the sheriff and the Judge, everyone present.
>
> The Court: I understand that. But I'm just suggesting these courtrooms are not designed to have private conversations and with the additional concern of security in the lock-up as well as in the rest of the room, it makes the security issues quite complex. At this point the Chief Judge's order is in place and in force." (Tr. 168-69)

The prosecutor stated:

> "In there through the window, Judge. We do not have any numbers as to exactly how many defendants would have been in that holding area with the defendant at that time. However it's the State's position that since the Court had cleared some of its call already even though on the 10th of June there were some 18 male defendants who came up

> it would be the State's position that more than half of those would have already been sent back at the time that counsel--" (Supp. R. 11)[4]

That still left half a dozen or more other inmates to overhear the attorney-client communications.

The right of conversation between attorney and client which is recognized as essential to attorney-client communication and thus, to effective representation, historically has been accepted as being **private** conversation. This is clear from the representative

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[4] Submitted to the District Court were a videotape and still photographs of the area involved. As and when needed for this Court's assistance in deciding whether to consider this cause, these visual exhibits, matters of Record in the habeas proceedings below, will be transmitted to this Court.

State and federal decisions set out in the margin, demonstrating that the *restriction on privacy* in the present case does indeed rise to the level of *prohibition* on attorney-client communication; consider these historical decisions soundly condemning restrictions on privacy of consultation as violating the right to counsel.[5]

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[5] Louie Yung v. Coleman, 5 F. Supp. 702 (D. Idaho 1934) (court ordered prison officials to permit defendant charged with murder to have private pre-trial consultations with counsel; incarcerated accused has constitutional right to PRIVATE consultation); Ex Parte Qualls, 58 Cal.App.2d 330, 136 P.2d 341 (1943) (consultation in large room used by many attorneys and clients, with presence of sheriff's deputies, provided no opportunity for PRIVATE and CONFIDENTIAL consultation with attorney; court vindicated right to private consultation, which it deemed corollary to constitutional right to representation by counsel; court ordered

(continued...)

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[5](...continued)
that facilities for PRIVATE consultation must be provided and the right to such privacy must be respected); Ex Parte Rider, 50 Cal.App. 797, 195 Pac. 965 (1920) (Superintendent would not permit minor charged with felony to consult with attorney except in Superintendent's presence; court issued habeas corpus to enforce right to PRIVATE consultation with attorney; right of accused in custody to have an opportunity to consult freely with counsel without any third person whose presence is objectionable to the accused, is one of the fundamental rights guaranteed by the American criminal law which no legislature or court can ignore or violate); Thomas v. Mills, 117 Ohio St. 114, 157 N.E. 488 (1927) (defendant proceeded in Court of Appeals, seeking to set aside murder conviction and life sentence; pending such appeal, counsel sought private interview with client; warden insisted on presence of warden or an officer; court issued mandatory injunction to enforce prisoner's right to PRIVATE consultation; refusal to permit private interview denied citizen's right to have justice administered without denial or delay; right to be represented by counsel in every stage of a criminal proceeding is a right inherent in justice itself and
(continued...)

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[5](...continued)
any person who is denied the right is denied justice); State ex rel. Tucker v. Davis, 9 Okla. Crim. 94, 130 Pac. 962 (1913) (sheriff and jailer held in contempt for refusal to permit prisoner to consult privately with court-appointed counsel; right to be heard by counsel would be emasculated if it did not include the right to a FULL and CONFIDENTIAL consultation with counsel); Turner v. State, 91 Tex. Crim. 627, 241 S.W. 162 (1922) (reversing burglary conviction; pre-trial private jail consultations prohibited until allowed by new sheriff on day before trial, when defendant first communicated to counsel, information re defense; motion for continuance to identify and contact witnesses was denied; reviewing court held continuance required to prepare defense; accused's constitutional right to counsel not satisfied where custodian present at interview; law contemplates PRIVATE and CONFIDENTIAL communication between attorney and client); McBride v. State, 121 Tex. Crim. 549, 51 S.W.2d 337 (1932) (pre-trial private consultation denied; on day of trial, counsel first learned defendant claimed his confession was coerced; court denied continuance; robbery conviction reversed). See also the following cases re physical obstructions to communications.

(continued...)

"Rationale" of 7th Circuit Opinion

The dual "bottom line" of the 7th Circuit Opinion - (a) that this was an "unscheduled recess," and (b) that since the Record did not reflect that counsel explained to the State trial court, that

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[5](...continued)
As to what kinds of restrictions amount to constitutional violations, see People v. Zammora, 66 Cal. App.2d 166, 152 P.2d 180 (1944) (reversing murder convictions where defendants not so situated in courtroom as to be able to FREELY and UNINTERRUPTEDLY communicate and consult with their attorneys - court's duty to provide adequate quarters and facilities; court has power to do so without limitation); Ex Parte Snyder, 62 Cal. App. 697, 217 Pac. 777 (1923) (habeas corpus granted; screen separated attorney and client, preventing passing of papers; interviews in room with many attorneys and clients; facilities did not permit privacy; constitutional right to assistance of counsel denied where consultations held within hearing of others and without opportunity to receive, exchange, sign, examine, or read legal documents and other writings).

he needed private consultation to prepare defendant for his testimony, it was "logical" for the court to assume that no special need for private consultation would exist with respect to such a non-scheduled recess - is wrong in every aspect.

Most notably, this was NOT an "unscheduled recess"; it was the reasonably anticipated, noon lunch-time recess. Counsel expected it, as, reasonably, did all trial participants.

Next, where counsel tells the court that he needs private consultation, and it is shortly before the State ends its case, it is "logical" to assume that the need for private consultation is for VITAL attorney-client consultation - including preparation of defendant's

testimony, One should not assume they simply want to discuss baseball scores or the State of the Union.

And finally, to the extent defendant's success in this case may depend on resolution of the factual matters (a) whether the recess was scheduled or unscheduled, (b) whether the trial court understood - though it may not have been set out on the record - that counsel needed to prepare defendant for defendant's testimony; these are factual issues that should have been resolved at a habeas evidentiary hearing, NOT in a Court of Appeals Opinion without evidentiary basis. Accordingly, to the extent that the 7th Circuit's "bottom line" (App. A, p. 12) is based on assumptions

concerning facts that warrant evidentiary hearing, the cause should be remanded with appropriate directions to determine and resolve those factual issues.

This Court should grant certiorari to resolve the issues presented in this Petition - which are crucial to the administration of habeas corpus jurisprudence and to the constitutional right to effective assistance of counsel.

The 7th Circuit Opinion not only threatens to emasculate that right; it has made assumptions crucial to its decision, as to issues which can properly be resolved only after evidentiary hearing.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

APPENDICES

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 95-4065

SYLVESTER ABRAMS,

Petitioner-Appellant,

v.

PAUL BARNETT, Warden,
Danville Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 601—**Brian Barnett Duff**, *Judge*.

ARGUED SEPTEMBER 27, 1996—DECIDED NOVEMBER 8, 1996

Before BAUER, FLAUM and DIANE P. WOOD,
Circuit Judges.

FLAUM, *Circuit Judge*. A jury convicted Petitioner Sylvester Abrams of first degree murder, and the Appellate Court of Illinois affirmed his conviction on direct appeal, *People v. Abrams*, 631 N.E.2d 1312 (1994). Abrams subsequently filed a petition for writ of habeas corpus in federal district court. The district court denied his petition, *Abrams v. Barnett*, No. 95 C 601, 1995 WL 758405 (N.D. Ill. Dec. 18, 1995), and Abrams now appeals, alleging (i) that his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to testify

were violated when the trial court prohibited him from consulting privately with counsel during a noon-time recess in the trial; (ii) that the use of a suggestive identification procedure by police denied him due process in violation of the Fourteenth Amendment; and (iii) that various evidentiary rulings made by the trial judge violated his Fourteenth and Sixth Amendment rights. We conclude that Abrams' constitutional rights have not been violated and therefore affirm the judgment of the district court.

I.

Because this case comes to us on petition for writ of habeas corpus, this court must accept the factual findings of the state trial and appellate courts as true. 28 U.S.C. § 2254(e)(1) (1996);[1] *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Mills v. Jordan*, 979 F.2d 1273, 1279 (7th Cir. 1992). The following facts are taken from the state appellate court opinion and from the trial record.

At trial, two witnesses testified to having seen Abrams shoot Leroy Williams on January 3, 1990. The first of these witnesses was Jennifer Williams, the victim's sister. Jennifer was standing in the entryway of her aunt's apartment watching her brother load boxes into his car when she noticed a group of seven males huddled on the street corner. She recognized one of these men as the petitioner, whom she knew by the nickname "Dusty." Jennifer had an unobstructed view of Abrams from where she was standing approximately 50 or 60 feet away. She saw him fire two shots at her brother, run around the building toward the alley, and then fire three more shots at Leroy, fatally wounding him. Abrams was wearing a "Christmas green" jogging suit at the time.

Jennifer told the police when they arrived on the scene that "Dusty" had shot her brother. She testified that she

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[1] The former section 2254(d) was redesignated as section 2254(e) by section 104 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214.

provided no description of the assailant to any officer with whom she spoke at the scene. Later that night, the police took Jennifer to the station. She was told that she would view a lineup in order to identify the suspected murderer. Police led her into a room with a window that exposed another room where the petitioner was seated at a table by himself.

Jennifer denied on cross-examination that the police had warned her beforehand that the petitioner would be in the room. However, Detective Mike Miller, the officer who arrested the petitioner, responded affirmatively on cross-examination when asked whether he had informed Jennifer beforehand that she would be seeing Abrams. Miller explained that a lineup was not employed in this case because there was no question that Jennifer knew the identity of the shooter. Because the purpose of the identification would be to exclude the petitioner, if possible, a lineup would be a waste of police resources. Officer Williams also testified that, when he went to Abrams' home to arrest him, Abrams attempted to slam the door, ran for the back of the apartment, and had to be wrestled to the ground by the police.

Jennifer had known Abrams for approximately five years prior to the shooting and had seen him in the neighborhood nearly every day in those five years. They were fairly well-acquainted and had played cards together. She testified that the petitioner was dark-skinned and approximately 260 pounds at the time of trial, but described him as "lighter," weighing approximately 160 pounds at the time of the shooting. This testimony was contradicted by that of Detective Miller, the arresting officer, who described the petitioner as weighing approximately 260 pounds at the time of his arrest. Jennifer was also acquainted with three of petitioner's brothers, including his brother Jimmy, with whom she went to school. She described Jimmy as shorter than the petitioner, with a light-brown complexion and curls in his hair.

Officer Bruce Brady testified that while he was on patrol on January 4, 1990 he observed a man being followed by

a group of men wielding baseball bats. The group of men shouted that the man they were pursuing was carrying a gun. Officer Brady arrested the man and, in the course of a custodial search, recovered a .38 caliber revolver. The officer later learned that the arrestee was Jimmy Abrams, petitioner's brother. Ballistics reports revealed that the .38 that was recovered was the weapon used to kill Leroy. At the time of his arrest, Jimmy was 5'5" and weighed 145 pounds.

Chicago police officer Consuelo Morgan and her partner were the first officers to arrive at the scene. Morgan questioned the persons who had gathered around the body of the victim. Her report indicates that she was given a description of the perpetrator as being 5'6" and 185 pounds. She testified that she had written the names of some of the witnesses with whom she spoke but omitted others "because they were afraid to speak." The defendant objected to this statement. The trial judge sustained the objection and ordered the response stricken but denied Abrams' motion for a mistrial. Morgan testified that Jennifer did not give a description of the shooter because she was in shock, but that Jennifer did identify the shooter as "Dusty." Detectives John McKenna and Dave Delponte, who were assigned to investigate the murder, filed a report at the end of their shift in which the perpetrator was described as 5'6" and weighing 160 pounds.

The second witness who testified to having seen the defendant shoot Leroy was Nakita Bailey, the victim's cousin. Nakita had an obstructed view from the front window of her third floor apartment of the street and saw "Dusty" fire two shots at Leroy, disappear for about a minute, and then fire three more shots. When she first saw the petitioner, he had been standing on the street corner wearing a green jogging suit. Nakita had been aware of who the petitioner was for approximately three years prior to the shooting. On cross-examination, after being reminded that she had not told anyone what she had witnessed until almost two years after the shooting, she explained that she decided to tell Jennifer what she had wit-

nessed after Jennifer complained to her that no one had come forward to testify against the defendant. On redirect examination, after being asked why she had not come forward earlier, she stated, "I was afraid the gang members would do the same to me." The trial judge overruled Abrams' objection to this answer.

Near the close of the state's case, the court allowed a two-hour recess for lunch. When court reconvened, defense counsel objected to the conditions under which he was permitted to speak with the petitioner during the recess. The following exchange took place:

> THE COURT: Here comes Mr. Cohn. Mr. Cohn, you have had an opportunity to speak with your client now, is that right?
>
> MR. COHN: Well, I don't think I have had an adequate opportunity to speak to my client. I object to the fact that during the noon recess I have been prohibited from being able to meet with my client in a private place in a private way other than through speaking to him through a tiny little hole where there are other people in the room back there, other inmates. It's not private, it's not confidential. . . .
>
> THE COURT: I understand your concern. . . . The issue, of course, is a question of security and the sheriffs are especially, this week, very concerned about security as there was a significant security breach in this building last week. . . . I have given you an opportunity to at least speak here. With that I think we're ready to bring in the jury.
>
> MR. COHN: "Here" means in open court with the State's Attorney and the sheriff and the Judge, everyone present.
>
> THE COURT: I understand that. But I'm just suggesting these courtrooms are not designed to have private conversations and with the additional concern of security in the lock-up as well as in the rest of the room, it makes security issues quite complex. At

this point the Chief Judge's order is in place and in force.

The petitioner took the stand in his own defense, denying that he had shot Leroy and denying that he had ever played cards with Jennifer. He testified that at the time of the shooting he was playing basketball with men whom he knew only by appearance. The jury found Abrams guilty of first-degree murder, and the court sentenced Abrams to thirty years imprisonment.

II.

As an initial matter, we note the standard of review applicable to Abrams' petition for habeas corpus. Under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, "an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been adjudicated on the merits in State court proceedings[,] unless" this court finds that the state court adjudication either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. at § 2254(d). In determining whether the Appellate Court of Illinois' decision was contrary to federal law, this court must rely on the jurisprudence of the Supreme Court of the United States. *See Lindh v. Murphy*, No. 95-3608, 1996 U.S. App. LEXIS 24136, at *33-34 (7th Cir. Sept. 12, 1996) (recognizing that the new § 2254(d) is a "retrenchment from former practice, which allowed the United States courts of appeals to rely on their own jurisprudence in addition to that of the Supreme Court.").

III.

We turn now to Abrams' first argument. Abrams contends that the trial judge violated his Sixth Amendment right to counsel by denying him the opportunity to consult privately with his attorney during a two-hour, noontime recess in the trial.[2] Abrams argues that his ability to confer with his attorney was impaired due to the trial court's failure to provide him with a room in which the two could consult privately. This impairment, according to Abrams, is a deprivation of the right to counsel as recognized by the Supreme Court in *Geders v. United States*, 425 U.S. 80 (1976).

In *Geders*, the Supreme Court held that a court order preventing the defendant from consulting with his attorney during a 17-hour, overnight recess violated the defendant's right to assistance of counsel as guaranteed by the Sixth Amendment. *Id.* at 91. The Supreme Court found it relevant that the recess "was an overnight recess, 17 hours long" and that the court's order prevented the defendant from consulting with his client "about anything." *Id.* The Court found this total prohibition to be a *per se* violation of the defendant's right to assistance of counsel and reversed the defendant's conviction without requiring a showing of actual prejudice. The Court made clear, however, that it was dealing with a "17-hour overnight recess, when an accused would normally confer with counsel" and that it was not expressing an opinion on "an order barring communication between defendant and counsel during a 'brief routine recess during the trial day.' " *Id.* at 89 n.2 & 91.

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[2] Abrams did not raise on direct review to the Appellate Court of Illinois his claim that the inability to consult with his attorney in private violated his right to testify under the Fourteenth Amendment. Abrams has therefore waived the right to have this claim reviewed in federal habeas corpus proceedings. *See Farrell v. Lane*, 939 F.2d 409, 411 (7th Cir.), *cert. denied*, *Farrell v. McGinnis*, 502 U.S. 944 (1991).

As this court recognized in *Sanders v. Lane*, *Geders* was an "extreme case" such that "it was easy for the Supreme Court to determine that the defendant was deprived of the right to counsel." 861 F.2d 1033, 1036 (1988), *cert. denied*, 489 U.S. 1057 (1989). In *Perry v. Leeke*, 488 U.S. 272 (1989), the Supreme Court addressed the more difficult issue of whether the rule it announced in *Geders* applied to an order prohibiting counsel from speaking with his client during a 15-minute afternoon recess that occurred in the middle of the defendant's testimony. The Court held that, "in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice." *Id.* at 284. According to the Supreme Court, what was controlling in *Geders* was the fact that during an overnight recess it would be normal for the defendant to discuss matters on which the defendant has a constitutional right to seek advice, such as trial strategy and the availability of other witnesses. *Id.* The Court acknowledged that "the line between the facts of *Geders* and the facts of [*Perry*] is a thin one," but stated that "[i]t is, however, a line of constitutional dimension." *Id.* at 280. *Perry* therefore clarifies the rule announced in *Geders*, making clear that not every prohibition on attorney consultation during trial violates the Constitution.

In the instant case, we do not have before this court a case involving a "prohibition" on attorney consultation as in *Geders* and *Perry*, but rather only a denial of petitioner's request that the court provide him with a private location in which he could consult with his attorney during the lunch recess. The Appellate Court of Illinois correctly noted that *Geders* does not stand for the proposition that "a conviction must be reversed whenever conditions existed during trial which rendered client/attorney consultations less than ideal." *Abrams*, 631 N.E.2d at 1318. *Perry* recognizes that, in cases less egregious than *Geders*, courts must determine whether the limitations imposed by the trial court are of "constitutional

dimension."[3] *See Perry*, 488 U.S. at 280. An examination of the surrounding facts and circumstances is therefore necessary to determine whether the defendant in fact was prohibited from consulting with counsel.[4]

After examining the limitations imposed by the trial judge in the instant case, the Appellate Court of Illinois found that the trial judge "imposed no prohibition comparable to the sequestration order[ ] found in *Geders* . . . ." *Abrams*, 631 N.E.2d at 1318. In *Geders*, the defendant was prohibited from having *any* contact with his attorney

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[3] The district court assumed the presence of a Sixth Amendment violation in order to "obviate[ ] the need to interpret the scope of the right of private consultation." *Abrams*, 1995 WL 758405, at *3. We, like the Appellate Court of Illinois, make no such assumption and therefore squarely address the issue of whether the trial judge's failure to provide a private location for petitioner to consult with his attorney during the recess violated petitioner's right to assistance of counsel.

[4] In *Sanders v. Lane*, 861 F.2d 1033 (1988), *cert. denied*, 489 U.S. 1057 (1989), a case decided prior to the Supreme Court's decision in *Perry*, this court addressed the issue of how courts should determine when a prohibition on attorney-client consultation violates the Sixth Amendment. We stated, "One way would be to allow the court to look at the circumstances—the length of the recess, the degree of the restriction, the status of the proceedings, the presence or absence of an objection—and to decide, based on those factors, whether there has been a sixth amendment violation. This approach tends to build in some of the considerations that would be pertinent in assessing harmless error." *Id.* at 1036. We note that *Sanders* was a case involving a total prohibition on attorney-client consultation during a trial recess. An examination of the circumstances surrounding the court's prohibition was therefore unnecessary, as we held that the defendant need not establish prejudice in order to establish a Sixth Amendment violation. *See id.* at 1039. In contrast, in the instant case it is not at all clear that the court in fact prohibited the defendant from consulting with his attorney. An examination of the surrounding circumstances is therefore necessary to determine whether the conditions under which Abrams was permitted to speak with his attorney were tantamount to a prohibition on attorney-client consultation.

during the overnight recess in the trial. In contrast, Abrams does not argue that the court ordered him not to consult with his attorney. Instead, he objects to not having been given the opportunity to consult with his lawyer in a "private place." As the appellate court noted, defense counsel declined to consult with his client during the recess, opting instead to ask the court to permit him to speak with his client in a private room. After the recess, defense counsel again opted not to utilize the opportunity offered by the court to speak with his client in the courtroom. We agree with the Appellate Court of Illinois that "the rule of *Geders* simply does not obtain in this case," *id.*, as Abrams was not prohibited from consulting with his attorney.

We do not mean to suggest that there are no circumstances in which the restrictions imposed by a court on the manner in which a defendant is permitted to consult with his attorney, short of an express order prohibiting attorney consultation, could amount to a deprivation of the right to assistance of counsel. We are mindful that the criminal defendant's right to counsel is one of fundamental importance; therefore, the opportunity afforded a defendant to exercise such right must be a meaningful one. However, we also bear in mind that the right protected by the Sixth Amendment is the right of effective assistance of counsel, not the absolute right to consult in a private place with one's attorney during every trial recess. *Cf. Perry*, 488 U.S. at 279 (recognizing fundamental importance of right to counsel but holding that Sixth Amendment not violated). As the Supreme Court recognized in *Perry*, a thin line often separates one case from another, but the line nevertheless must be one of "constitutional dimension." Abrams has failed to show that the conditions under which he was permitted to speak with his attorney constituted a deprivation of his right to assistance of counsel. We therefore conclude that the determination of the Appellate Court of Illinois that Abrams' Sixth Amendment right to counsel has not been violated is consistent with the Supreme Court's decisions in *Geders* and *Perry*.

We note additionally that an examination of the record further supports the Appellate Court of Illinois' conclusion that Abrams failed to show that he had actually been deprived of assistance of counsel. In its opinion, the state appellate court cited *People v. Brooks* in which the Illinois Supreme Court explained that, in order to find that the court denied defendant his right to consult with counsel, the record must first reflect that the court was made aware that consultation was desired. 505 N.E.2d 336, 340-41, *cert. denied*, *Brooks v. Illinois*, 484 U.S. 825 (1987). In that case, the Illinois Supreme Court stated:

> '[It] is one thing to say that a defendant who has been deprived of the guiding hand of counsel need not demonstrate the prejudicial effect of that deprivation; it is quite another to say that he need not show that the challenged order deprived him of counsel he would otherwise have received.' In the absence of an objection to the court's order, or similar indication that consultation was desired, we cannot say that the trial judge's order denied the defendant her right to the assistance of counsel.

Id. (internal citations omitted). *See also Crutchfield v. Wainwright*, 803 F.2d 1103, 1110 (11th Cir. 1986) (recognizing that defendant or defense counsel must indicate desire to consult and stating that such a rule "satisfies [the] concern for the important constitutional right of assistance of counsel, provides for the orderly conduct of trials, and makes sense"), *reh'g denied*, 810 F.2d 208 (1987), *cert. denied*, *Crutchfield v. Dugger*, 483 U.S. 1008 (1987). The appellate court noted that the record reflected only that defense counsel objected to being unable to meet with his client in a private room; counsel offered no explanation as to why the level of privacy afforded by the court would not permit counsel to consult meaningfully with his client. Defense counsel elaborated at oral argument before this court, explaining that he had not previously reviewed with his client the questions that he would be asked on direct examination and that he was relying on the noon recess to prepare his client's testimony. However, the record

does not indicate that counsel explained his position to the trial judge or that he requested a continuance in order to prepare his client.

The necessity for such an objection by the defendant is clear. The recess in the instant case was an unscheduled, two-hour recess which occurred on the final day of trial. Under such circumstances, it was logical for the trial judge to presume that the opportunities available to counsel to meet with his client were adequate, as preparation of the defendant's testimony is not the type of assistance normally provided by counsel during an unscheduled recess on the final day of trial. As the Supreme Court recognized in *Perry*, the Court's decision in *Geders* was motivated by the fact that an attorney normally consults with his client on a variety of trial-related matters during an overnight recess. 488 U.S. at 284. In contrast, the Court stated that there is no constitutional right to advice during a "short recess in which it is appropriate to presume that nothing but defendant's [ongoing] testimony will be discussed . . . ." *Id.* The trial judge in this case appropriately assumed that the opportunities available to Abrams to consult with his attorney were adequate given the type of assistance normally provided during an unscheduled recess; counsel for the defendant did nothing to give the trial judge reason to think otherwise.

IV.

Abrams next argues that the "show-up" identification procedure[5] employed by the police was unduly suggestive and that the trial court's failure to suppress the identification evidence denied him due process of law. Petitioner points to the fact that the police informed Jennifer Williams prior to the show-up that she would be viewing Abrams

[5] A show-up "occurs when only one suspect is presented to [the] witness[ ]." *United States v. Clark*, 989 F.2d 1490, 1495 n.2 (7th Cir. 1993).

and argues that the police seated him behind a table in order to conceal that he was taller than 5'6" and weighed more than 160 pounds. Abrams contends that police sought to have the witness identify him as the shooter despite the fact he did not match the physical description given to the police by other witnesses at the scene, who had described the assailant as 5'6" and weighing between 160 and 180 pounds.

An identification procedure is unduly suggestive if, considering the totality of the circumstances, it creates "a very substantial likelihood of irreparable misidentification." *Neil v. Biggers*, 409 U.S. 188, 198 (1972). The factors to be considered in determining the admissibility of identification testimony are "[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of his prior description, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and confrontation." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (citing *Biggers*, 409 U.S. at 199-200).

The Appellate Court of Illinois, in applying the factors laid out by the Supreme Court in *Brathwaite*, found the following facts relevant: (1) that the witness "had a clear view of the defendant throughout the incident," (2) that the witness "gave detailed attention to the individual who shot her brother," (3) that an "insignificant amount of time elapsed from the time of the incident until the challenged identification occurred," (4) that the witness' testimony reflected from the beginning that "Dusty" was the murderer and that she knew "Dusty" "quite well from the neighborhood," (5) that the witness never admitted, despite defendant's repeated efforts, "that she had given "the physical characteristics which had been included in various police reports and which purportedly described defendant's brother," and (6) that the witness knew the defendant's brother and "stated without pause that [he] was not the shooter." *Abrams*, 631 N.E.2d at 1325-26.

The constitutionality of an identification is a mixed question of law and fact. See *Sumner v. Mata*, 455 U.S. 591,

597 (1982); *Armstrong v. Young*, 34 F.3d 421, 427 (7th Cir.), *cert. denied*, 115 S. Ct. 1369 (1994). When, as is true in this case, "the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts[,] . . . § 2254(d)(1) restricts the grant of collateral relief to cases in which the state's decision reflects an 'unreasonable application of' the law." *Lindh v. Murphy*, 1996 U.S. App. LEXIS at *37. The Appellate Court of Illinois correctly cited the factors that the Supreme Court has deemed relevant and, in applying these factors, the court carefully relied on evidence in the record to support its determination that the identification procedure at issue was constitutional. We therefore conclude that the state court's determination that Jennifer's identification was reliable was not the result of "an unreasonable application of" the law.

V.

We turn next to Abrams' contention that various evidentiary rulings made by the trial judge deprived him of due process. We begin by noting that "[t]he admissibility of evidence is generally a matter of state law." *Milone v. Camp*, 22 F.3d 693, 702 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 720 (1995). "Absent a showing that the admission of evidence violated a specific constitutional guarantee, a federal court can issue a writ of habeas corpus on the basis of a state court evidentiary ruling only when the ruling violated the defendant's right to due process . . . ." *Id.* We therefore issue a writ of habeas corpus only in those cases in which the court's evidentiary ruling can be said to have denied the defendant the right to a fundamentally fair trial. *See id.*; *Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989).

Abrams first argues that the trial judge's denial of the defense's motion to declare a mistrial after a prosecution witness made a hearsay statement denied him due process. Officer Morgan, after being asked by the prosecution whether all of the witnesses with whom she spoke

were listed in her report, responded: "Some are listed in the case report and some are not because they were afraid to speak." We agree with the Appellate Court of Illinois that this hearsay was not so prejudicial as to warrant the declaration of a mistrial. The trial judge sustained the defense's objection and ordered the statement stricken from the record. As the state court noted, petitioner did not request that the court give a curative instruction, nor has he offered any evidence, other than a conclusory statement that the admission was prejudicial, in order to support his claim. We therefore conclude that trial court's failure to declare a mistrial did not deprive Abrams of a fundamentally fair trial.

Abrams next argues that the trial judge's admission into evidence of Nakita Bailey's testimony that she did not come forward until almost two years after the shooting because she was "afraid the gang members would do the same to [her]" denied him due process. Defendant contends that the suggestion that he was affiliated with a gang was highly prejudicial. Although we are cognizant that evidence of gang membership has a tendency to cast a defendant in an unfavorable light, this is not to say that such evidence is never relevant in a criminal trial. *See United States v. Thomas*, 86 F.3d 647, 652 (7th Cir. 1996) (collecting cases); *United States v. Butler*, 71 F.3d 243, 251 (7th Cir. 1995) (collecting cases). As the trial judge and the state court recognized, this evidence was offered on redirect examination to rehabilitate the witness. On cross-examination, the defense brought out the fact that Nakita had waited nearly two years to report what she had witnessed. Nakita's statement was therefore necessary in order to rebut the defense's suggestion of recent fabrication and its admission cannot be said to have denied the defendant a fundamentally fair trial.

Lastly, Abrams argues that the trial judge excluded evidence which would have impeached the credibility of witness Jennifer Williams and which would have suggested that Jennifer incorrectly identified the petitioner as the assailant, when in fact the assailant was his brother Jimmy.

Jennifer testified on direct examination that she knew Jimmy because they went to school together. When asked whether she had ever seen Jimmy around the neighborhood, she testified that "he never hung on Grenshaw Street," but that he frequented a gameroom on Roosevelt Road. She responded affirmatively when asked on cross-examination whether she had seen Jimmy during the two years prior to the incident.

In order to impeach Jennifer's credibility, defendant sought to introduce evidence that Jimmy had been incarcerated during the first six months of the two-year period during which Jennifer claims to have seen Jimmy. The trial judge excluded this evidence on the ground that it was prejudicial and of little probative value. We agree. The evidence Abrams sought to offer regarding Jimmy's incarceration was collateral to the issue of whether Jennifer had confused Abrams with his brother Jimmy. Given that the period of two years was only an estimate by the witness and the fact that the witness testified to having known Jimmy both from school and the gameroom she frequented, evidence of Jimmy's incarceration had very little probative value and would have served only to confuse and prejudice the jury.

Abrams also sought to elicit testimony from the officer who arrested Jimmy as to Jimmy's home address, which was two blocks from the location of the shooting. The petitioner sought to show that Jimmy could have been in the vicinity on the day of the shooting and to impeach Jennifer's testimony that "Jimmy never hung on Grenshaw Street," the street on which the shooting occurred. The trial court properly exercised its discretion in excluding this evidence for lack of relevance, as it was collateral to the issue of how Jennifer was acquainted with Jimmy. In addition, as the Appellate Court of Illinois recognized, Jimmy could have lived anywhere in the Chicagoland area and have still been in the area on the day of the shooting. The exclusion of such evidence can hardly be said to have denied petitioner the right to a fundamentally fair trial.

For the foregoing reasons, we AFFIRM the judgment of the district court denying Abrams' petition for writ of habeas corpus.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. SYLVESTER ABRAMS, Petitioner,	)	
v.	)	No. 95 C 601
PAUL BARNETT, Warden, Danville Correctional Center, Respondent.	)	

MEMORANDUM OPINION

A jury found Petitioner Sylvester Abrams ("Abrams") guilty of first degree murder in the January 3, 1990 shooting death of Leroy Williams. The jury returned the verdict after a trial at which two eyewitnesses testified they saw Abrams shoot Williams. The Illinois Appellate Court upheld the conviction,

and the Illinois Supreme Court denied discretionary review. Abrams presents this Petition for a Writ of Habeas Corpus ("Petition") under 28 U.S.C. § 2254 in which he alleges numerous Constitutional errors. For the reasons discussed below, the Court denies the Petition.

I

The Court must accept as true the factual findings of the state trial and appellate courts. 28 U.S.C. § 2254(d); Sumner v. Mata, 449 U.S. 539, 547, 101 S. Ct. 764, 769 (1981); Smith v. Fairman, 862 F.2d 630, 632 (7th Cir. 1988), cert. denied, 490 U.S. 1008, 109 S. Ct. 1645 (1989). The following summary of the factual background is taken mostly from the appellate court

opinion, with some additions from the trial record.

During the afternoon of January 3, 1990, a group of men were standing on the corner of Grenshaw Street and Central Park Avenue in Chicago, Illinois. Leroy Williams ("Leroy") and another man were nearby loading boxes into a car. A man wearing a "Christmas green" jogging suit emerged from the group on the corner and fired two shots in the direction of Leroy. After firing the shots from the corner, he ran around the building toward an alley, from where he fired three more shots. Leroy was hit and fell to the pavement. He was later pronounced dead. The gunman fled through the alley, heading toward Roosevelt Road.

Leroy's sister Jennifer Williams ("Jennifer") was standing in a doorway about 50 or 60 feet away from where Leroy was shot. The day was sunny and she had an unobstructed view of the assailant. When police arrived on the scene, she informed them that "Dusty" shot her brother. "Dusty" was Abrams' nickname. Jennifer had been acquainted fairly well with Abrams for about five years before the incident, having played cards with him. At the time of the incident, she was "extremely distraught" and provided no physical description of the assailant to the police. (R. 121). However, at a later date not specified in the record, a Defense investigator interviewed Jennifer. Jennifer informed that investigator that she had known the

shooter "Dusty" for several years, that he was about 5'6", and that he weighed about 160 pounds. (R. 41-42). According to a police report of the incident, other witnesses described the assailant as being 5'6" and weighing 185 pounds. (R. 121). Another police report by different police officers reported the assailant as being 5'6" and weighing 160 pounds. (App. Op. at 6).

Both at the time of the incident and at the time of trial two years later, Abrams was 5'11" and weighed at least 260 pounds. On cross examination, Jennifer addressed the apparent inconsistency of her prior statement by stating her belief that Abrams weighed 100 pounds lighter in 1990 than in 1992. (R. 35-36).

Abrams was arrested the day after the shooting and was brought to the police station. Jennifer was brought in for an identification. Detective Mike Miller informed Jennifer that she would be seeing Abrams. Detective Miller escorted Jennifer into the room where Abrams was seated at a desk. Jennifer positively identified Abrams as the shooter. Detective Miller testified that the purpose of the one-on-one show-up was to exclude Abrams, if possible; since Jennifer had already identified the assailant by name and was familiar with him, Detective Miller determined that a lineup would be a waste of police resources. (R. 160; App. Op. at 6).

Another eyewitness, Nakita Bailey

("Bailey"), testified that she saw Abrams shoot Leroy Williams. Bailey was in her third floor apartment looking out the window. She had an unobstructed view of the street below her, where she saw Leroy filling a car with packing crates. She saw Abrams, wearing a green jogging suit, shoot two bullets at the car. After losing sight of him, she saw him a minute later across the street as he fired three more shots at Leroy. She knew Abrams because he was a companion of her cousin (who was also Leroy's twin brother) and because she had seen him many times around her neighborhood.

At the time of the trial, Bailey was 15 years old. (R. 73). She never related her account to the police, and only came forward nearly two years after

the incident when Jennifer lamented to her the fact that no one had come forward to testify against Abrams. On redirect, when asked why she did not reveal her knowledge earlier, she replied, "[b]ecause I was afraid the gang members would do the same to me." Abrams' objection to this answer was overruled.

The day after the shooting, Police Officer Bruce Brady arrested Abrams' brother Jimmy, but for reasons independent of the investigation into Leroy Williams' murder. While on patrol, Officer Brady observed a group of men wielding baseball bats following a man he estimated to be 5'5" and weighing 145 pounds. The pursuers shouted that the man they chased carried

a gun. Officer Brady stopped and arrested the man and, while conducting a custodial search, recovered a .38 caliber revolver which was loaded. Officer Brady only later learned that the arrestee was Jimmy Abrams, the Petitioner's brother. At trial, the parties stipulated that the .38 which the officer confiscated from Jimmy was the weapon used to kill Leroy Williams.

Abrams testified on his own behalf at trial, stating that he did not shoot Leroy Williams and that he never played cards with Jennifer. He described his brother Jimmy as being 5'6" and weighing 160 pounds with a complexion slightly lighter than his own. He testified he was playing basketball at the time of the shooting with men he knew only by

appearance.

Near the close of the state's case, with one prosecution witness left to testify, the trial court held a two hour lunch recess. When it reconvened in the afternoon, counsel objected to the conditions in the holding cell area provided for attorney-client consultations. Citing unusual security concerns at that time in the courthouse, the trial court would not permit counsel to consult with his client alone in a conference room or across bars in a cell, as was customary. Instead, counsel was permitted to consult through a 1" by 4" hole leading into the bullpen area where prisoners are detained. When counsel objected after the lunch break because of the need to shout through the

hole and the presence of other prisoners in the holding area, the court suggested the two consult sotto voce at the counsel table before court reconvened. Counsel objected to this, too, based on concern for the privacy of communications made in front of the prosecutor and the court.

Abrams alleges the following five grounds in his Petition. First, he alleges the trial court denied him effective assistance of counsel under the Sixth Amendment when it prohibited him and counsel from having a private consultation. Second, he alleges the appellate court denied him due process when it held him responsible for producing evidence concerning his Sixth Amendment claim that was accepted as

true in the trial court. Third, he alleges the prosecutor denied him due process and the right of confrontation when it relied on hearsay accusations, when it adduced irrelevant testimony about gang members, and when it closed its case with arguments that mischaracterized the Defense's theory of the case. Fourth, he alleges the trial court denied him due process when it prohibited him from introducing evidence about Abrams' 1988 whereabouts. And lastly, he alleges that the police denied him due process when they used an unnecessarily suggestive identification procedure. All of these claims are properly before the Court.

II

A.

Abrams' first claim is that the trial court deprived him of the assistance of counsel. This claim is without merit because, even assuming a constitutional violation, the error was harmless beyond a reasonable doubt.[1] Prohibiting consultation between a defendant and his attorney during a critical stage of the prosecution constitutes a per se Sixth Amendment violation not subject to review for prejudice. Sanders v. Lane, 861 F.2d

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[1]The Court's assuming the presence of a Sixth Amendment violation obviates the need to interpret the scope of the right of private consultation. There seem to be no cases interpreting when a restriction on attorney-client communication rises to the level of a prohibition on attorney-client communication.

1033, 1039 (7th Cir. 1988), cert. denied, 489 U.S. 1097, 109 S. Ct. 1323 (1989). Such a prohibition is impermissible no matter how short a length of time, unless it comes during the defendant's testimony. See Perry v. Leeke, 488 U.S. 272, 284-85, 109 S. Ct. 594, 602 (1988); Geders v. United States, 425 U.S. 80, 91, 96 S. Ct. 1335, 1337 (1976). Although a per se violation, it is still subject to a harmless error analysis, as long as the prohibition was of a type that would not contaminate the entire criminal proceeding. See Satterwhite v. Texas, 486 U.S. 249, 257, 108 S. Ct. 1792, 1798 (1988); Sanders, 861 F.2d at 1040.

Abrams does not dispute that the harmless error analysis applies. Under

that analysis, any Sixth Amendment violation in this case was harmless beyond a reasonable doubt. At the time of the lunch recess, three witnesses remained to be called. The only state witness left to testify was Officer Brady, whose testimony concerned the apprehension of Abrams' brother Jimmy. After the state rested, Abrams testified for his own defense, and Detective Greg Braunberg testified briefly to clarify in what room of an apartment Abrams was arrested.

Abrams argues that any Sixth Amendment violation was not harmless beyond a reasonable doubt because "counsel could not prepare his client concerning the crucial facts testified to by Detective Miller." (Reply at 6).

Detective Miller had testified that Abrams tried to slam the front door on police and ran from the living room into the bedroom of an apartment when six to eight officers arrived to arrest him. In closing arguments, the state argued this showed consciousness of guilt.

Two hours of face to face communication would not have changed the outcome of the guilty verdict. No matter how Abrams testified concerning the events surrounding his arrest, the state would still have argued that his actions showed consciousness of guilt because Detective Miller's testimony was already complete. Abrams has not even hinted how his testimony might have been different if informed by a two hour consultation with counsel, and if

different, how it might have declawed the state's argument that Abrams was conscious of his own guilt. Abrams' testimony differed from Detective Miller's in three respects. Detective Miller testified Abrams tried to slam the door; Abrams testified he did not try to slam the door. Detective Miller testified that Abrams fled into the apartment; Abrams testified he did not. Detective Miller testified that Abrams was arrested in the bedroom; Abrams testified he was arrested in the living room about fifteen feet from the front door. While there are differences, the differences were partly resolved when Detective Braunberg testified for the Defense that Abrams was arrested at the threshold between the living room and

the bedroom. Furthermore, the crux of the prosecution's case was the testimony of two eyewitnesses, not Abrams' consciousness of guilt.

In addition, any error resulting from the two hour prohibition, even if not harmless, would have been harmless if counsel had taken the remedial opportunity provided by the court. The trial court gave Abrams an opportunity to consult with counsel at the counsel table. Counsel refused the offer, citing the vicinity of the deputy sheriff, the prosecutors, and the court. Abrams does not explain why whispering with heads bent and mouths covered would have compromised any privileged communications. Discussions at the counsel's table would have been free of

any taint that had affected discussions through the speaking hole in the holding cell. Abrams was afforded an opportunity to consult with counsel, and counsel rejected it. This purged the two hour restriction on communication of any taint.

B.

Abrams' second claim is that the appellate court violated his due process rights. The appellate court stated that Abrams had failed to show how the trial court's two hour prohibition on face to face communication actually, as opposed to theoretically, impaired his right to counsel. Abrams construes this to mean the appellate court penalized him for not developing with evidence facts that were accepted as true in the trial

court. On the contrary, that part of the appellate opinion assumed for the sake of argument that communication was impossible. The appellate court simply held that he had not met his burden on appeal to show error. This was not a violation of due process; it was the operation of due process.

C.

Abrams' third claim is that the prosecutor violated his due process rights in several ways, all relating to the use of improper evidence or improper argument. First, Abrams argues that the prosecutor elicited from one of the testifying officers hearsay declarations identifying Abrams as the assailant. The introduction of particular evidence results in a due process violation only

when the prejudice to the defendant so outweighs the probative value that the defendant is deprived of a fundamentally fair trial. Milone v. Camp, 22 F.3d 693, 702 (7th Cir. 1994), cert. denied, 115 S. Ct. 720 (1995); Clark v. Duckworth, 906 F.2d 1174, 1177 (7th Cir. 1990); Dudley v. Duckworth, 854 F.2d 967, 972, reh'g denied (7th Cir. 1988), cert. denied, 490 U.S. 1011, 109 S. Ct. 1655 (1989); Palmer v. DeRobertis, 738 F.2d 168, 170 (7th Cir. 1984); cf. U.S. v. Fauls, 65 F.3d 592, 595 (7th Cir. 1995) (evidentiary rulings reviewed deferentially). The improper introduction of evidence is also subject to a harmless error analysis. Id. These brief hearsay declarations did not result in a fundamentally unfair trial.

They were an insignificant part of the police officer's overall testimony. In any event, since the objection was sustained and counsel did not think the declarations harmful enough to require a curative instruction, the declarations were harmless beyond a reasonable doubt. Thus this first ground does not encompass a constitutional defect.

Second, Abrams argues that the prosecutor elicited the irrelevant and prejudicial testimony of witness Nakita Bailey that she was afraid of gang members. However, the prosecutor elicited this testimony on redirect in order to rehabilitate the witness. Abrams had put the credibility of this witness at issue when he brought out on cross examination the fact of her two

year delay in reporting what she knew. The state asked her why she took so long, and she replied that she was afraid of gang members doing the same thing to her. The probative value of this testimony was significant on the collateral issue of witness credibility. The witness did not claim that she was receiving threats and did not claim that Abrams was a member of a gang. Cf. Dudley, 854 F.2d at 972 (evidence that witness received threats over telephone denied fundamental fairness, where no connection was made between defendant and threats). Thus this second ground, emerging as it does out of Abrams' own trial strategy, does not encompass a constitutional defect.

Finally, Abrams argues that the

prosecutor mischaracterized the Defense's theory of the case in closing arguments by telling the jury they would have to find a conspiracy between the police and civilians in order to acquit. However, prosecutors possess broad latitude in how they present their closing arguments. In order to establish a constitutional violation, the comments would have to have so infected the trial with unfairness as to make the resulting conviction a denial of due process. Kappos v. Hanks, 54 F.3d 365, 367 (7th Cir. 1995). Recently, the Seventh Circuit upheld the denial of a writ of habeas corpus in a case involving highly inflammatory closing arguments. See Rodriguez v. Peters, 63 F.3d 546, 550 (7th Cir. 1995)

(writ denied notwithstanding prosecutor's remarks that defense counsel's function was to "get his client off," remarks about defendant "scurrying off into the night to do it again," remarks that defense counsel lied to jury, remarks about defendant's sparse defense, vouching for witness' credibility, and misstatement of the law). The allegedly improper argument in this case does not even come close. Thus this third ground does not encompass a constitutional defect. Therefore the prosecutor did not violate Abrams' due process rights.

D.

Abrams' fourth claim is that the trial court denied him due process when it prevented counsel from introducing

evidence about Abrams' 1988 whereabouts. Abrams wished to use such evidence to impeach the testimony of witness Jennifer Williams. She testified she knew Abrams from seeing him around the neighborhood for two years prior to the January 1990 shooting, i.e., from January 1988 to January 1990. Abrams wished to present evidence that he was incarcerated in the first six months of 1988. The trial court did not allow that evidence admitted.

In order to violate a defendant's due process rights, a trial court's evidentiary ruling would have to amount to a denial of fundamental fairness. Palmer, 738 F.2d at 170. The evidence Abrams wished to introduce pertained to a collateral matter -- his whereabouts

two years before the events in question. Foreclosing examination on a collateral matter does not deny fundamental fairness. Denying the admission of that evidence was well within the constitutionally permissible discretion of the trial court. Therefore, the trial court did not violate Abrams' due process rights.

E.

Abrams' final claim is that the identification procedure used by the police was unnecessarily suggestive. An identification procedure is impermissibly suggestive when it gives rise to a substantial likelihood of misidentification. Stovall v. Denno, 388 U.S. 293, 301-02, 87 S. Ct. 1967, 1972-73 (1967). Factors to consider in

evaluating the reliability of an identification are "[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of [the witness'] prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the confrontation." Manson v. Braithwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977). On review, the constitutionality of the identification is a mixed question of fact and law. Armstrong v. Young, 34 F.3d 421, 427 (7th Cir. 1994), cert. denied, 115 S. Ct. 1369 (1995).

Abrams argues that (1) he was viewed alone in a one-on-one show-up;

(2) an officer informed the witness she was about to see Abrams; and (3) Abrams was seated behind a desk, which prevented the witness from distinguishing a 5'6" 160 pound man from a 5'11" 260 pound man.

The Court must accept the state court findings of historical fact as true. 28 U.S.C. § 2254(d). Those are embodied in the following excerpt from the appellate opinion.

> She [Jennifer Williams] testified to having had a clear view of defendant throughout the incident, and it would appear from her testimony that she gave detailed attention to the individual who shot her brother, pointing out, for instance, that the shooter wore a "Christmas green" jogging suit, a statement as to which she was corroborated by Nakita Bailey. And, although he took the stand in his own defense, defendant did

not bother to deny that he ever wore or even owned such garb. Too, an insignificant amount of time elapsed from the time of the incident until the challenged identification occurred, as witness Jennifer's having confirmed to the police as early as the day after the crime that defendant was her brother's killer.

With respect to the accuracy of her description and the certainty with which she established the identification, the record clearly reflects that from the beginning, her testimony had been that the murderer was "Dusty," whom she knew quite well from the neighborhood. Defendant admits that he is known as Dusty. Despite defendant's repeated efforts, Jennifer never admitted that she had given the physical characteristics which had been included in various police reports and which purportedly described defendant's brother; moreover, she acknowledged knowing defendant's brother, upon whom defendant attempted to deflect culpability for this crime, and she stated without pause that Jimmy Abrams was not the shooter.

(App. Op. at 31-32). In conformity with these findings, the Court takes as true that (1) the opportunity, (2) the degree of attention, (3) the accuracy, (4) the certainty, and (5) the length of time all support the state. Applying these facts to a de novo review of the reliability of the identification, the identification procedure did not violate Abrams' due process rights.

CONCLUSION

For the reasons stated above, the Petition is denied.

ENTER:

BRIAN BARNETT DUFF, JUDGE
UNITED STATES DISTRICT COURT

DATE: December 7, 1995